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No. 84-1250

In the Supreme Court of the United States

OCTOBER TERM, 1984

JERRY RAY MESSER,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

STEPHEN R. TATUM
(*Counsel of Record*)
PAUL J. MORRISON
Assistant District Attorney
for the 10th Judicial District
Johnson County Courthouse
P.O. Box 728
Olathe, Kansas 66061
(913) 782-5000
Counsel for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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QUESTIONS PRESENTED

1) Whether or not the defendant was denied his Sixth Amendment Right of Compulsory Process when the Court excluded the defendant's proffer of evidence that he has previously been misidentified in an unrelated case in Missouri.

2) Is a Federal Question presented regarding whether or not the physical lineup was deficient. If so, is further guidance needed in this area?

3) Does the question of the admissibility of polygraph evidence pose a federal question in this case?

TABLE OF CONTENTS

Questions Presented I
Table of Authorities III
Respondent's Brief in Opposition 1
Jurisdiction 1
Reasons for Denying the Writ 2
Conclusion 4

TABLE OF AUTHORITIES

Cases

Baldwin v. Kansas, 129 U.S. 52 (1889) 2
Cardinale v. Louisiana, 394 U.S. 437 (1969) 2
Herndon v. Georgia, 295 U.S. 441 (1935) 2
Homes Ins. Co. v. Dick, 281 U.S. 397 (1930) 2
Honeymoon v. Hanan, 30 U.S. 14 (1937) 2
Maxwell v. Newbold, 59 U.S. 511 (1856) 2
Simmons v. United States, 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967 4
State v. Calvert, 211 Kan. 174, 505 P.2d 1110 (1973) 3
State v. Collins, 214 Kan. 193, 518 P.2d 629 4
State v. Henderson, 205 Kan. 231, 468 P.2d 136 (1970) 3
State v. Mitchell, 220 Kan. 700, 556 P.2d 874 4
State v. Potts, 205 Kan. 42, 468 P.2d 74 (1970) 3

Constitution

Sixth Amendment, United States Constitution 2
Fourteenth Amendment, United States Constitution 2

Statutes

28 U.S.C. §1257(3) 1

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Kansas, respectfully requests that this Court deny the petition for writ of certiorari.

JURISDICTION

The petitioner asserts jurisdiction pursuant to Title 28, United States Code, §1257(3). The petitioner's brief, however, fails to raise any federal right, title, privilege or immunity which has been "specially set up or claimed" under 28 U.S.C. §1257(3). Of the three questions presented by the petitioner, only question (1) mentions any sort of federal right, title, privilege or immunity. Questions (2) and (3) fail to address any federal right, title, privilege or immunity whatsoever.

The petitioner also failed to raise the federal questions at the state court level. Once again, petitioner's question (1) was the only issue to even remotely discuss a federal right at the state court level. This consisted of the petitioner stating "The Sixth Amendment guarantees the accused compulsory process for obtaining witnesses in his favor. This right is part of the due process that the Fourteenth Amendment requires of the State." Federal questions have never been presented by the petitioner with regard to questions (2) and (3).

Supreme Court decisions have long been consistent and clear that federal questions must be raised and decided by the state court below before the Supreme Court has jurisdiction. *Maxwell v. Newbold,* 59 U.S. 511 (1856); *Baldwin v. Kansas,* 129 U.S. 52 (1889); *Herndon v. Georgia,* 295 U.S. 441 (1935); *Homes Ins. Co. v. Dick,* 281 U.S. 397 (1930); *Honeymoon v. Hanan,* 30 U.S. 14 (1937); and *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

A review of the Kansas Supreme Court decision, *State of Kansas v. Messer,* No. 54,873 (Kan. October 26, 1984), found in the petition, reveals that the questions presented were evidentiary and procedural in nature and did not deal with federal questions. Federal questions were neither raised nor decided at the state court level.

Therefore, because federal questions were not raised and decided below, this Court does not have jurisdiction.

REASONS FOR DENYING THE WRIT

QUESTION NUMBER 1. Throughout the pendency of this matter the petitioner has claimed that the two criminal incidents described were similar. The petitioner walked into an antique store, ordered the aged female

owner to "go to the back", and began to pistol whip the lady. She was then dragged to the back of the shop and beaten again. There was never a demand for money. The petitioner wished to present evidence of an armed robbery at a "snack shop" in Kansas City, Missouri wherein he was originally misidentified as the perpetrator. The victim of the armed robbery was not physically touched. The Kansas Supreme Court noted that "the two incidents were quite dissimilar." The petitioner has also noted that the perpetrator of the Topsy's robbery is a "look alike", or "double" of the petitioner. Once again the Kansas Supreme Court disagreed in noting "the descriptions of the perpetrators of the criminal acts of the two incidents varied in some important particulars." The petitioner does not raise a federal question. He simply asserts arguments regarding how the two criminal incidents are in fact similar.

The law in Kansas regarding the above question is clear. When the defendant attempts to present evidence that another party, and not he committed the crime with which the defendant is charged said evidence is inadmissible when the state relies on direct evidence to prove that the defendant in fact committed the crime. The only exception to this rule is a situation where there is direct evidence linking the third party to the crime. *State v. Calvert,* 211 Kan. 174, 505 P.2d 1110 (1973); *State v. Henderson,* 205 Kan. 231, 468 P.2d 136 (1970); *State v. Potts,* 205 Kan. 42, 468 P.2d 74 (1970).

In the case at bar, not only were the crimes dissimilar, but there was no direct evidence linking the other criminal to the crime with which the petitioner was charged. The law is clear. No federal question is involved. Further guidance is not needed on this issue.

QUESTION NUMBER 2. The Kansas Supreme Court in this case noted that the test in Kansas with regard to the admissibility of photographic and/or physical lineup identification is "whether the procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Mitchell*, 220 Kan. 700, 556 P.2d 874; *State v. Collins*, 214 Kan. 193, 518 P.2d 629.

The test stated above is consistent with the standard set by the United States Supreme Court. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967. There is no need for further guidance on this issue.

QUESTION NUMBER 3. In regard to the issue of the admissibility of polygraph evidence, the petitioner has at no time claimed a federal right, title, privilege or immunity. There continues to be no federal question presented in this regard and this Court is without jurisdiction.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN R. TATUM
Counsel of Record
PAUL J. MORRISON
Assistant District Attorney
10th Judicial District
Johnson County Courthouse
P.O. Box 728
Olathe, Kansas 66061
(913) 782-5000
Counsel for Respondent